Executive Aids Sdn Bhd v Kuala Lumpur Finance Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7-24-2593-89
LIM BENG CHOON J
9 JULY 1991

Civil Procedure *— Declaration — Power of court to grant declaratory relief — Discretion of court — Lack of bona fides on part of plaintiff*

Companies and Corporations *— Objects of company — Ultra vires — Company creating charge over its property for benefit of third party — Whether ultra vires the company — Whether charge valid — Companies Act 1965 s 20(1)*

Companies and Corporations *— Directors — Common director of two companies having knowledge of transaction involving companies — Whether such knowledge imputed to each company*

Land Law *— Charge — Sale of land ordered following enquiry by Land Administrator — Action commenced subsequently by chargor for order declaring charge to be invalid — Whether action properly brought — Whether chargor ought to have taken objection before Land Administrator — National Land Code 1965 ss 31, 260, 261, 262, 263 & 418*

The plaintiff, a company, were the owners of a piece of land which they had charged to the defendant as security for the repayment of a loan granted by the defendant to a company called Radio & General Trading Co (Holdings) Sdn Bhd ('R & G'). The plaintiff had obtained an order for sale of the land by public auction from the Land Administrator following an application for sale made under the provisions of the National Land Code 1965 following default in repayment of the loan. In the present action, the plaintiff sought, inter alia, a declaration that the charge was void and/or unenforceable against the plaintiff and that therefore the order for sale was null and void and also an order that any auction pursuant thereto be set aside.

The plaintiff alleged that at all material times R & G and the plaintiff were not related to each other in any manner whatsoever except that there were some common shareholders and directors. It was also alleged that the defendant knew that the companies were not related but nevertheless requested the charge to be created.

Following the commencement of the proceedings before the Land Administrator, the plaintiff had negotiated with the defendant to settle the loan and did not raise the question of the validity of the charge before the Land Administrator. A number of times, the plaintiff had requested the Land Administrator to postpone the sale that he had ordered before the plaintiff finally brought the question of the validity of the charge to the court, a delay of two years.

It was not disputed that a director of the defendant was also a director of the developer for whom R & G was working. It was contended that this common director had knowledge of the fact that the loan was not for the benefit of the plaintiff and that such knowledge must be imputed to the defendant as well.

Held, dismissing the action:

(1) Any defects in the procedure adopted by the chargee in his application for an order for sale which must include defects in the charge itself should be raised at the enquiry held by the Land Administrator. The chargee or chargor cannot be allowed to reopen the enquiry by bringing in a matter which the party concerned had failed to bring in at the beginning.

(2) It is within the discretion of the court to grant a declaration and the court must exercise the discretion with care, having regard to whether it is reasonable or not under the circumstances of the case to grant the relief. In the circumstances of this case the court questioned the bona fides of the plaintiff.

(3) If the plaintiff had any right to challenge the order of the Land Administrator, they should have appealed to the High Court under s 41 read with s 31 of the Code.

(4) As the creation of a third party charge as security for a loan to R & G was within the ambit of the object clause of the memorandum of association of the plaintiff, the defendant had no business to enquire as to whether the plaintiff had misapplied the loan. The defendant were, insofar as the object clause was concerned, not put on any notice by an express requirement that the power to take a loan was only exercisable for the purposes of the plaintiff's business.

(5) The knowledge of the common director of the developer and the defendant concerning the loan to be given to R & G secured by the charge of the property of the plaintiff could not be imputed to the defendant.

(6) As a licensed moneylending company, the defendant would have no hesitation in approving the loan considering that in the circumstances they must have been aware that the memorandum of association of the plaintiff empowered them to enter into the transaction.

(7) Section 20(1) of the Companies Act 1965, which enshrines a principle of equity, was applicable to the present case so as to render the third party charge created by the plaintiff fully effective and valid regardless of the knowledge acquired by the common director that the said charge was not created for the benefit of the plaintiff, which knowledge was not shared by the defendant.

[Bahasa Malaysia summary

Plaintif, sebuah syarikat, adalah tuanpunya sebidang tanah yang telah dicagarkan oleh mereka kepada defendan sebagai cagaran untuk pembayaran balik satu pinjaman yang telah diberikan oleh defendan kepada sebuah syarikat bersama Radio & General Trading Co (Holdings) Sdn Bhd ('R & G'). Plaintif telah memperolehi satu perintah jualan tanah itu melalui lelong awam dari Pentadbir Tanah selepas satu permohonan untuk jualan dibuat di bawah peruntukan Kanun Tanah Negara 1965 akibat keingkaran dalam pembayaran balik pinjaman itu. Di dalam tindakan ini, plaintif memohon, antara lain, satu deklarasi bahawa cagaran itu terbatal dan/atau tidak boleh

dilaksanakan terhadap plaintif dan bahawa lantaran itu perintah jualan itu tidak sah dan terbatal dan juga satu perintah bahawa apa-apa perlelongan yang dibuat menurutnya diketepikan.

Plaintif mendakwa bahawa pada semua masa yang penting R & G dan plaintif tidak ada hubungan antara satu sama lain dalam apa cara pun kecuali bahawa terdapat beberapa pemegang saham dan pengarah bersama. Plaintif juga mendakwa bahawa defendan tahu bahawa syarikat-syarikat itu tidak ada hubungan tetapi walau bagaimanapun masih memohon supaya cagaran itu diwujudkan.

Selepas permulaan tindakan di hadapan Pentadbir Tanah, plaintif telah berunding dengan defendan untuk menyelesaikan pinjaman itu dan tidak menimbulkan soalan kesahan cagaran itu di hadapan Pentadbir Tanah. Beberapa kali, plaintif telah meminta Pentadbir Tanah menangguhkan jualan yang telah diperintahkan itu sebelum plaintif sendiri membawa soalan kesahan cagaran itu ke mahkamah, satu kelewatan selama dua tahun.

Tidak dipertikaikan bahawa seorang pengarah defendan juga adalah pengarah pemaju yang telah menggaji R & G untuk membuat kerja. Adalah dihujahkan bahawa pengarah bersama ini mempunyai pengetahuan tentang fakta bahawa pinjaman itu bukan untuk faedah plaintif dan bahawa pengetahuan itu mesti dikatakan sebagai pengetahuan defendan juga.

Diputuskan, menolak tindakan itu:

(1) Apa-apa kecacatan dalam acara yang digunakan oleh penerima cagaran di dalam permohonannya untuk satu perintah jualan, yang mesti meliputi kecacatan di dalam cagaran itu sendiri, harus ditimbulkan di siasatan yang diadakan oleh Pentadbir Tanah. Penerima cagaran atau pemberi cagaran tidak boleh dibenarkan membuka semula siasatan itu dengan membangkitkan suatu perkara yang telah gagal dibangkitkan olehnya di permulaan.

(2) Adalah di dalam budibicara mahkamah membuat deklarasi dan mahkamah mesti menjalankan budibicara itu dengan cermat, dengan mempertimbangkan sama ada munasabah atau tidak dalam keadaan kes memberi relif itu. Di dalam keadaan kes ini mahkamah telah menyoal bona fides plaintif itu.

(3) Jika plaintif mempunyai apa-apa hak untuk mencabar perintah Pentadbir Tanah, mereka harus merayu kepada Mahkamah Tinggi di bawah s 41 dibaca dengan s 31 Kanun itu.

(4) Oleh kerana pengwujudan cagaran pihak ketiga sebagai cagaran untuk satu pinjaman kepada R & G adalah di dalam lingkungan fasal objek memorandum persatuan plaintif, defendan tidak ada sebab untuk menyoal sama ada plaintif telah menggunakan pinjaman itu dengan salah. Defendan, mengikut fasal objek itu, tidak diberikan notis oleh satu kehendak nyata bahawa kuasa untuk mengambil pinjaman cuma boleh dijalankan untuk tujuan perniagaan plaintif.

(5) Pengetahuan pengarah bersama pemaju dan defendan tentang pinjaman yang akan diberikan kepada R & G dengan cagaran tanah plaintif tidak boleh disifatkan sebagai pengetahuan defendan.

(6) Sebagai satu syarikat peminjam wang berlesen, defendan tentu tidak keberatan meluluskan pinjaman itu memandangkan yang dalam keadaan kes mereka harus sedar bahawa memorandum persatuan plaintif membenarkan mereka memasuki transaksi itu.
(7) Seksyen 20(1) Akta Syarikat 1965, yang memaktubkan satu prinsip ekuiti, adalah terpakai dalam kes ini untuk menjadikan cagaran pihak ketiga yang diwujudkan oleh plaintif berkuasa dan sah sepenuhnya, tidak kira pengetahuan yang diterima oleh pengarah bersama bahawa cagaran itu tidak diwujudkan untuk faedah plaintif, satu pengetahuan yang tidak dikongsi oleh defendan.]

Notes
For cases on declaration, see 2 *Mallal's Digest* (4th Ed) paras 780-796.

Cases referred to
1 *Yat Tung Investment Co v Dao Heng Bank* [1975] AC 581 (refd)
2 *Sheoparnam Singh v Ramanandan Singh* (1916) 43 IA 91 (refd)
3 *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 (refd)
4 *Dusun Semenyih Sdn Bhd v Development & Commercial Bank Bhd* [1988] 3 MLJ 156 (refd)
5 *Public Bank Bhd v Metro Construction Sdn Bhd* [1991] 3 MLJ 56 (folld)
6 *Rolled Steel Products (Holdings) Ltd v British Steel Corp & Ors* [1985] 3 All ER 52 (distd)
7 *Re David Payne & Co Ltd* [1904] 2 Ch 608 (folld)
8 *Re Hampshire Land Co* [1896] 2 Ch 743 (folld)

Legislation referred to
Companies Act 1965 s 20(1)
National Land Code 1965 ss 31, 260, 261, 262, 263, 418

KH Chan (*Khaw & Hussein*) for the plaintiff.
LS Ng (*Sothi & Ang*) for the defendant.

Cur Adv Vult

Lim Beng Choon J: In their application made by way of this originating summons dated 5 December 1989, the plaintiff, Executive Aids Sdn Bhd is seeking for a declaration that the charge presentation No 338/86 Jilid 70 Folio 53 ('the charge') created by the plaintiff in favour of the defendant, Kuala Lumpur Finance Bhd, over the land held under GM 1653 Lot 1223 Mukim Batu ('the property') is void and/or unenforceable against the plaintiff and therefore the order of sale dated 11 March 1988 granted by the Land Administrator ('the order of sale') is null and void and any auction pursuant thereto be set aside. The plaintiff is also seeking for an order for a stay of any auction of the property pending the disposal of their application.

The case for the plaintiff, as can be garnered from the contents of the affidavit of Chan Hean Chuan @ Arthur Chan ('Arthur Chan'), a director of the plaintiff, affirmed on 10 December 1989 (encl 2) is as follows. In

developing Kuala Lumpur Plaza ('KL Plaza') Lian Seng Properties Sdn Bhd ('LSP') had contracted with Radio & General Trading Co (Holdings) Sdn Bhd ('R & G') to carry out the mechanical and electrical installation works on KL Plaza. Substantial works on the project had been carried out by R & G and by January 1986 LSP was indebted to R & G Co for a sum in excess of $1m in respect of the works done by R & G. Arthur Chan was at the material time also a director of R & G. Due to the substantial sum owing by LSP to R & G for which LSP had failed to pay despite repeated demands, Arthur Chan, as director of R & G, went to see Wong Teck Lim who was at the material time a director of LSP as well as a director of the defendant company. At the meeting, as an interim measure, one Tan Chor Eng, a shareholder of the plaintiff, with the concurrence of Wong Teck Lim suggested that R & G should obtain a loan of $0.5m ('the loan') from the defendant so that R & G would have sufficient liquid funds to meet its pressing expenses incurred in carrying out the works on KL Plaza at LSP's requests for which LSP had then yet to pay R & G. Apparently Arthur Chan agreed to the proposal and Wong Teck Lim later arranged with the defendant to lend $0.5m to R & G. Since the defendant could not lend money without security it was suggested that the land held by the plaintiff under Lot 1223, Mukim Batu, District of Kuala Lumpur Wilayah ('the charged land') was to be charged by the plaintiff to the defendant. As a result, the defendant sent a letter of offer dated 5 February 1986 to the plaintiff. By that letter the defendant offered to grant a term loan of $0.5m to the plaintiff payable within six months and as security of the loan the land owned by the plaintiff be charged to the defendant. There were other conditions set out in the said letter. For purpose of this judgment I need only to quote three of the conditions which are:

(a) Receipt of the board resolution from the borrower authorizing the borrowing and acceptance of the facility.
(e) All relevant loan and security documents shall have been executed by the borrowers and presented for registration at the appropriate authorities.
(f) Receipt of a true copy of memorandum and article of association of borrower.

R & G accepted the offer but with a request that the defendant should reconsider the schedule of payment. Nothing comes out of this request and this request is not in issue in the present case. Thereafter the charge was duly created by the plaintiff over the land in favour of the defendant. It was alleged by the plaintiff that at all material times R & G and the plaintiff were not related to each other in any manner whatsoever except that there were some common shareholders/directors. It was also alleged that the defendant knew that the plaintiff and R & G (being the borrower of the defendant) were not related, nevertheless requested the charge to be created. The plaintiff therefore contends that the charge is void and unenforceable for the following reasons:

(1) ultra vires the powers of the plaintiff and/or was not for the benefit or purpose of the plaintiff; and/or
(2) the defendant's knowledge through their director Wong Teck Lim or constructive notice of the non-relationship between R & G and the plaintiff; and

(3) the purpose for which the loan was intended was to reduce the pressure on LSP to pay to R & G the debt due and owing by LSP to R & G.

One Izani bin Haji Mohamad, attorney of the defendant company, affirmed an affidavit in reply on 23 August 1990 (encl 13) in which it was asserted that the original hearing of the enquiry for an order of sale of the property was postponed to 11 August 1987 as there was negotiation for a settlement. In fact after the enquiry held on 11 August 1987 the plaintiff through their solicitors Messrs LC Chan had paid a sum of $30,000 to the chargee/defendant and had requested the auction fixed on 10 December 1987 to be called off. The payment was made apparently in response to the letter of the defendant dated 2 December 1987 to its own solicitors Messrs Sothi & Ang (exh 'KLF1' annexed to encl 13), the relevant part of which reads:

> Kindly liaise with Messrs LH Chan to arrange for:
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> (1) a cheque of $30,000 payable to us for immediate clearing; and
> (2) an irrevocable undertaking from them to pay us a further sum of $30,000 on or before 15 December 1987. The letter of undertaking should be forwarded to us together with the initial payment of $30,000 not later than 7 December 1987, failing which we shall proceed with the auction sale scheduled on 10 December 1987.

The first preliminary point of law brought up by counsel for the defendant is that as the application of the plaintiff in this originating summons is in effect to set aside the order of sale which the Land Administrator had granted as far back as 11 August 1987 in respect of the property by way of public auction which was to be held on 10 December 1987, the plaintiff should appeal against the Land Administrator's decision pursuant to s 418 of the National Land Code 1965 ('the NLC'). Counsel for the plaintiff on the other hand submitted that the plaintiff here was challenging the validity of the charge — it said that the charge was void and unenforceable and therefore the order of sale of the Land Administrator was likewise null and void. Now under the scheme of the NLC the Land Administrator has been given full jurisdiction to hold an enquiry in respect of land held under a Land Office title of which a charge has been created as security for a loan given by the chargee to the chargor or a loan given to a third party which loan the chargor agreed to charge his land as security for that loan when the chargee applies to him to hold such enquiry (see ss 260, 261, 262 and 263 of the NLC). Any defects in the procedure adopted by the chargee in his application for an order of sale, which must include defects in the charge itself, should be raised at the enquiry held by the Land Administrator. In the present case it is not disputed, indeed it cannot be disputed, that the plaintiff had notice that the said enquiry was to be held on 11 August 1987 at 9am at the Land Administrator's office at Wilayah Persekutuan (see AR Registered letter of the defendant to the plaintiff dated 14 April 1987 annexed as exh 'KLF2' to encl 13). Yet the plaintiff deliberately failed to appear at the said enquiry to raise any objection. I say 'deliberately' because after the enquiry the plaintiff negotiated with the defendant to settle the loan taken by them by tendering an initial sum of $30,000 (see the letter of the defendant dated 2 December 1987 which I have produced above). So here we have a situation where the plaintiff deliberately refused to raise the question of the validity of the charge at the enquiry of the Land Administrator which they should, so that all questions relating to the charge could

be settled at the enquiry, and thereafter negotiated with the defendant to settle the loan thereby leading the plaintiff to request the Land Administrator to postpone the auction of the property a number of times before it finally brought up this question of the validity of the charge to this court on 18 December 1989 after a lapse over two years. I repeat under the scheme of the NLC all questions should be raised at the Land Administrator's enquiry and the chargee or chargor cannot be allowed to reopen the enquiry of the Land Administrator by bringing in a matter which the party concerned had failed to do so at the beginning. An analogy may be borrowed from the case of *Yat Tung Investment Co v Dao Heng Bank*[1] in support of this proposition. After all it is not an absolute right to obtain a declaratory decree. It is discretionary upon the court to grant it or not and the court must exercise the discretion with care as to whether it is reasonable or not under the circumstances of the case to grant the relief prayed for — see *Sheoparnam Singh v Ramanandan Singh.*[2] In the circumstances of this case I question the bona fide of the plaintiff and I have no doubt that I am right in refusing to exercise my discretion to grant the relief sought for particularly when the Land Administrator had rightly and properly exercised his jurisdiction to grant the order of sale. If the plaintiff had any right to challenge the order of the Land Administrator it should have appealed to this court under s 418 read with s 31 of the NLC (see *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd*[3] and *Dusun Semenyih Sdn Bhd v Development and Commercial Bank Bhd*[4]). In arriving at this conclusion I have not overlooked the affidavit of Arthur Chan, a director of the plaintiff, affirmed on 21 July 1990 in which he exhibited the minutes of the enquiry held by the Land Administrator. At the top of the six-page minutes there is a box on which it is stated 'Di hadapan Saya Pada 12 Ogos 1987 Perbicaraan di Jabatan Tanah Wilayah ...'. Arthur Chan therefore alleged that the Land Administrator had postponed the enquiry from 11 August 1987 to 12 August 1987 without informing the plaintiff. But upon a careful scrutiny of the minutes it is to be noted that after having held a full enquiry the Land Administrator wrote at the end of the six-page minutes these words 'Bertarikh pada *11 Ogos 1987*' before he stamped it with his official seal and appended his signature thereto. Viewing the evidence as a whole I have no doubt that the enquiry was held on 11 August 1987 and the date of 12 august 1987 in the box was an administrative error.

If I am wrong in arriving at the above conclusion, I would examine the merits of the plaintiff's case. From the assertions of the affidavits of Arthur Chan, a director of the plaintiff company, it seems to me that the real questions posed to this court are:

(1) whether the third party charge of the defendant's property was ultra vires the objects of the plaintiff company as set out in its memorandum of association and if so whether the transaction is saved by s 20(1) of the Companies Act 1965;

(2) whether the third party charge even intra vires the plaintiff company's memorandum of association if created by the directors acting outside and beyond their powers in that the charge was not created for the benefit or interest of the plaintiff company can be regarded as validly created and if not whether s 20(1) of the Companies Act 1965 applies to validate the charge.

To answer these two questions, it is necessary to examine the relevant clauses of the memorandum of association of the plaintiff company (annexed as exh 'CKH1' of the affidavit of Chan Kak Hong affirmed on 26 April 1990 — encl 7). A scrutiny of cl 3 of the said memorandum shows that the plaintiff company was established to carry on a very wide range of business enterprises such as housing development, importing, exporting, manufacturing and sale of many kinds of goods, operating of hotels and lodging facilities, operating of travel agencies, mining, quarry and so on. Four significant objects of the plaintiff are set out in paras 31, 32, 33 and 56 of the said cl 3 which reads:

> 31 To transact business as financiers, promoters and financial and monetary agents in any part of the world and for such purposes to establish agencies and to appoint financial and managing agents and attorneys and to produce the company to be registered and recognized.
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> 32 To receive money on deposit or to borrow or raise money with or without security, or to secure the payment or repayment of money or the satisfaction, observance or performance of any obligation or liability undertaken or incurred by the company in such manner as the company thinks fit and in particular by mortgage or charge upon the undertaking or any part of the undertaking of the company or upon all or any assets of the company or by the creation and issue of debentures or debenture stock (perpetual or terminable) charged as aforesaid or constituting or supported by a floating charge upon present and future property including uncalled and called but unpaid capital.
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> 33 To lend and advance money or give credit to such persons or companies and on such terms as may seem expedient and in particular to customers, companies, corporations firms and others having dealings with the company and to give guarantees or become surety and give security to any such persons and companies.
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> 56 To make contributions and donations and in any other manner to give aid and assistance and help to any person, firm company, association, society or other body or party for any whatsoever object or purpose.

Clause 3 of the said memorandum then ends up with the following statement:

> ... further that the objects specified in each paragraph of this clause shall be regarded as independent objects and accordingly shall except where otherwise expressed in any paragraph be in nowise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company but may be carried out in as full and ample a manner and construed just as wide a sense as if the paragraph defined the objects of a separate distinct and independent company.

Now upon a cursory reading of the aforesaid paragraphs there can be no doubt that the plaintiff is empowered to create a third party charge on the property to secure a loan for R & G. It is however contended that the said charge was not created for the benefit or for the furtherance of the object of the plaintiff company and hence the charge is null and void. I have had occasion to deal with the principle of law covering this point in my judgment in *Public Bank Bhd v Metro Construction Sdn Bhd*[5] in which I have been able to distil the principle of law covering this point after reviewing some English cases which is this:

> Where a company has a general power to borrow money for the purposes of its business, a lender is not bound to enquire into the purpose for which the money is intended to be applied and the misapplication of the money by the company does not avoid the loan in the absence of knowledge on the part of the lender that the money was intended to be misapplied — see headnote of *Re David Payne & Co* [1902] 2 Ch 608 which was cited with approval by Harman LJ in *Re Introduction Ltd* [1969] 1 All ER 887 at 890.

In the more recent case of *Rolled Steel Products (Holdings) Ltd v British Steel Corp & Ors*[6] (a case relied on by counsel for the plaintiff to support his contentions of which I shall have more to say presently), Browne-Wilkinson LJ explained the principle in greater clarity when his Lordship said at p 92:

> The critical distinction is, therefore, between acts done in excess of the capacity of the company on the one hand and acts done in excess or abuse of the powers of the company on the other. If the transaction is beyond the capacity of the company it is in any event a nullity and wholly void; whether or not the third party had notice of the invalidity, property transferred or money paid under such a transaction will be recoverable from the third party. If, on the other hand, the transaction (although in excess or abuse of powers) is within the capacity of the company, the position of the third party depends on whether or not he had notice that the transaction was in excess or abuse of the powers of the company. As between the shareholders and the directors, for most purposes it makes no practical difference whether the transaction is beyond the capacity of the company or merely in excess or abuse of its powers: in either event the shareholders will be able to restrain the carrying out of the transaction or hold liable those who have carried it out.

His Lordship went on to examine *Re David Payne & Co Ltd*[7] and then made this proposition at p 93:

> That case, therefore, is clear authority for two propositions: (1) that where there is power to borrow for the purposes of the company's business (even if contained in the objects clause) and the borrowing is made otherwise than for those purposes, the borrowing is not void as being ultra vires; and (2) a third party is not put on notice by an express requirement that the power is only exercisable for the purposes of the company's business.

Applying the legal principle to the present case, as the creation of a third party charge as security for a loan to R & G is within the ambit of the object clause of the memorandum of association of the plaintiff, the defendant has no business to enquire as to whether the plaintiff has misapplied the loan. Furthermore the defendant is, insofar as the object clause is concerned, not put on notice by any express requirement that the power to take a loan is only exercisable for the purposes of the company's business.

The matter, however, does not end here for the plaintiff has brought out the matter of a discussion which its director Arthur Chan had with one Wong Teck Lim. As LSP had failed to pay R & G a sum of over $1m for works done, Arthur Chan who was at the material time also a director of R & G approached Wong Teck Lim, a director of LSP, to seek payment to R & G. At the meeting it was alleged that one Tan Chor Eng (a shareholder of the plaintiff) with the concurrence of Wong Teck Lim suggested that R & G should obtain a loan of $0.5m from the defendant, of which Wong Teck Lim was at the material time a director, so that R & G would have sufficient liquid funds to meet its pressing expenses incurred in carrying out

the work on KL Plaza. Thereafter it was alleged that Wong Teck Lim arranged for the defendant to lend $0.5m to R & G. In consequence of the loan the defendant requested the plaintiff to charge its property to the defendant as security for the repayment of the loan. It is important to note that the suggestion was mooted by Tan Chor Eng who owned 78,871 shares of the plaintiff company and Wong Teck Lim merely concurred with the suggestion. Furthermore it was an informal meeting where Arthur Chan as director and on behalf of R & G sought payment from LSP. That being the case there is therefore no or at least not sufficient evidence to establish that Wong Teck Lim concurred with the suggestion in his capacity as director of the defendant. Even to say that Wong Teck Lim concurred with the suggestion in his capacity as director of LSP is rather tenuous simply because upon a request made by Arthur Chan for payment he, as director and on behalf of LSP, could only convey to the latter whether or not LSP could pay R & G all or part of the debts or could not pay anything at all. It follows therefore that Wong Teck Lim gave his concurrence to the suggestion in his personal capacity and nothing more. It is however suggested by the plaintiff that Wong Teck Lim 'later arranged for the defendant to lend $0.5m to R & G'. But we have not been told what the nature of the arrangement carried out by Wong Teck Lim was to convince the managing director, the general manager and four other directors to approve the loan to R & G. All we have is a letter from the defendant dated 5 February 1986 (see exh 'AC-2') approving the loan to R & G and the material terms are as follows:

Borrower	:	Radio & General Trading Co Sdn Bhd.
Facility	:	Term loan of $500,000 only.
Tenure	:	Six (6) months. Interest to be serviced monthly.
Security	:	4.8125 acres of agricultural land currently under Executive Aids Sdn Bhd.
Guaranteed by	:	Tan Jin Choon Arthur Chan.

There are also other conditions and the more pertinent conditions are these:

(g) Presentation of the charge for registration with relevant land registry and a search being made by KLFB's solicitors in the relevant land registry immediately prior to the presentation of the charge for registration confirming that the said land is free from all encumbrances and that no caveat or prohibitory order has been presented or registered over the said land or any part thereof.

(i) Third party first legal charge in favour of Kuala Lumpur Finance Bhd.

From the aforesaid letter of approval of the loan to R & G it is clear that R & G applied to the defendant for a loan of $0.5m payable within six months and as security for repayment of the loan R & G with the authority of the plaintiff offered to charge the property of the plaintiff for repayment of the loan. I will go even further and say that because Arthur Chan as director of R & G and the plaintiff company and Tan Jin Choon, a major shareholder of R & G, had given their personal guarantee concerning the repayment of the loan, the directors of the defendant company thereby agreed to approve the loan. More importantly is that the plaintiff had on 6 February 1986

executed and registered the charge of the plaintiff's property which had the seal of the plaintiff company and signed by its pengarah and setiausaha. The annexure to the charge instrument also had the seal of the plaintiff company and signed by one of its directors and secretary. In such a situation where the defendant was merely approving the loan which was well secured by a charge of the plaintiff's property and the guarantee of two persons whom the defendant felt were trustworthy persons, can it be said that the defendant had notice of what transpired at the informal meeting between Arthur Chan, Tan Chor Eng and Tan Jin Choon on the one side and Wong Teck Lim on the other side? I think not. In support of this proposition I would revert to the case of *Re David Payne & Co Ltd*[7] mentioned earlier. In this case one Kolckmann, who was a director of the Exploring Land and Minerals Co, and was also financially interested in David Payne & Co Ltd, having ascertained in his private capacity that that company proposed to borrow a sum of £6,000 for purposes outside the scope of its business, induced his own company to lend the said sum to that company on the security of a debenture of that company for the sum of £6,250 and the money was duly affirmed for purposes outside the scope of its business. David Payne & Co Ltd had a general power of borrowing under its memorandum and articles of association but only for purposes of its business. No other director of Exploring Land and Minerals Co except Kolckmann knew how the money was intended to apply. Subsequently David Payne & Co Ltd was wound up and the liquidator applied to the court for a declaration that a second mortgage debenture for £6,250 purported to have been issued by that company to the Exploring Land and Minerals Co was ultra vires and void and did not constitute a charge on the undertaking or assets of the borrowing company. The two main grounds upon which the liquidator based his case were (1) that the borrowing was not authorized by the memorandum and articles of the company and was absolutely ultra vires independently of the question whether the lending company had notice of the purposes for which the money was to be applied; and (2) that Kolckmann's knowledge ought to be imputed to the lending company. As to ground (1) the court rejected it for the reasons as stated in the headnote of the reported case which I have reproduced earlier. As to ground (2) the trial judge Buckley J in rejecting it said at p 611 of the reported case:

> Under the circumstances, am I to say that the Exploring Land and Minerals Co had notice of what Kolckmann knew? I think not. I understand the law to be this: that if a communication be made to an agent which it would be his duty to hand on to his principals, who in this case, of course, were the Board of which Kolckmann was but one member, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose, and which he did not disclose. I think, therefore, I ought not to impute to the Exploring Land and Minerals Co the knowledge which Kolckmann had.

When the matter went on appeal to the Court of Appeal, the decision of Buckley J was upheld. In so doing Romer LJ said at pp 618-619 of the reported case:

In the first place, where you have a limited company with a memorandum of association authorizing the company to embark on a series of transactions, if among those purposes you find a power to borrow generally for the purposes of the company, I take it to be clear beyond controversy at the present day that, when money is being borrowed within the limits of the power of borrowing as to amount, the person who lends the money is not bound to inquire to what purpose the borrowing company is about to apply the money so borrowed; and if *Davis*'s case LR 12 Eq 516 is an authority to the contrary, I cannot agree with it. The only other question is as to imputed notice. I take it that there was a transaction between the Exploring Land and Minerals Co and David Payne & Co of this kind. The first company lent 6,000*l* secured by a debenture of the second company. Now that transaction was intra vires the second company. But there was some evidence to shew that it was intended by some of the directors of the second company to apply the money for purposes not authorized and altogether improper qua the second company. Now, one director of the first company knew how that money was going to be applied. He acquired that knowledge through some conversation which he had with some people in his private capacity before that transaction was carried out by the lending company. The question is whether, inasmuch as that director took part on behalf of his company in authorizing the lending of the money and the acquisition of the debenture and assisted in carrying out that transaction, the knowledge of that director so acquired is to be considered the knowledge of the lending company. Is that knowledge as a matter of law to be imputed to the lending company? In my opinion no such notice can be imputed at law. I take it that in such a transaction the lending company was not bound to inquire as to the application of the money at all by the borrowing company. That being so, it appears to me that knowledge independently acquired by a director in his personal capacity in respect to a matter which was irrelevant so far as concerned the lending company is knowledge which cannot be imputed to the company, for it was knowledge of something which really did not concern the lending company as a matter of law. Therefore, you cannot imply a duty on the part of the director to have told these facts to the lending company, or a duty on the part of the lending company to have inquired into that question.

The second case which I would like to refer to is *Re Hampshire Land Co.*[8] In this case the directors of a company were empowered to borrow money on its behalf but not beyond the paid-up capital of the company without the consent of a general meeting. A general meeting gave the required consent but the notices summoning the meeting did not, as required by the regulations of the company, specify that borrowing beyond the limit was to be authorized by the meeting. The paid-up capital of the company was only £10,000 but the money borrowed from a society was in the sum of £30,000. The secretary of the lending society was also the secretary of the borrowing company. The company was subsequently wound up and the society claimed to be entitled to prove in the winding up of the company for a debt of £30,000 for money lent to the company. Again the question to the court was whether the knowledge of the secretary could be imputed to the society. Vaughan Williams J answered the question in the negative and held that the money lent could be proved for in the winding up of the company. The grounds of his Lordship's decision were summarized in the headnote of the reported case and they are as follows:

Where one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has

> acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, or even irregularity, the court will not draw the inference that he has fulfilled these duties.

Transposing the principles enunciated by the two cases cited above to the present case, since I have found as a fact that Wong Teck Lim concurred with the suggestion of Tan Chor Eng in his private personal capacity and since there is no evidence that the former had disclosed what had transpired at the meeting with Arthur Chan to the other directors of the defendant, his knowledge concerning the loan to be given to R & G secured by the charge of the property of the plaintiff could not be imputed to the defendant company. Furthermore this is a case of a company applying for a loan of $0.5m to be secured by a charge of the plaintiff's property. As a licensed moneylending company, the defendant would have no hesitation in approving the loan considering that in the circumstances of this case it must be aware that the memorandum of association of the plaintiff company empowers it to enter into the transaction.

Quite apart from what have been discussed above, I must have regard to the provisions of s 20(1) of the Companies Act 1965 which read:

> No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer.

From the facts of this case as adumberated above, there is no doubt at all that the said s 20(1) is applicable to the present case and renders the third party charge created by the plaintiff fully effective and valid regardless of the knowledge acquired by Wong Teck Lim that the said charge was created not for the benefit of the plaintiff company which knowledge was not known to the defendant company.

Turning to the *Rolled Steel Products (Holdings) Ltd case*[6] cited by counsel for the plaintiff to support his contention that the third party charge was null and void, it is my considered opinion that the facts in that case are clearly distinguishable from the facts in the present case. There the plaintiff company, Rolled Steel Products (Holdings) Ltd ('RSP'), carried on business as wholesalers of steel. The two directors were S and his father. S held 51% of the shares and the remaining 49% was held by three trustee-shareholders in trust for the benefit of S's children. Under cl 3(k) of RSP, it was empowered to 'lend and advance money or give credit to such persons, firm or companies and on such terms as may seem expedient ... and to give guarantee or become security for any such persons, firms or companies'. S formed another company (SSS Ltd) and on behalf of that company entered into an agreement with C Ltd, a steel producing company, for SSS Ltd to act as distributor of coil and cut steel for C Ltd (which was later taken over by the British Steel Corp (BSC)). S arranged for the

plaintiff company to set up a steel service centre for SSS Ltd to operate its business with some £400,000 borrowed from SSS Ltd. After the centre was erected SSS Ltd commenced operation by purchasing large stocks of coil and cut steel on credit from C Ltd SSS Ltd thereby incurred a debt to C Ltd which eventually amounted to some £860,000 a sum substantially in excess of its only significant asset, namely, the debt of £400,000 owed to it by the plaintiff company. When SSS Ltd failed to respond to pressure to reduce the debt BSC, acting for C Ltd, first obtained a personal guarantee of the debt from S and then proposed that the plaintiff company guaranteed SSS Ltd's debt to C Ltd. The plaintiff company was known to have sufficient assets (including another leasehold land — the Rainham site valued at £850,000) to meet the debt. As a result a scheme was devised whereby C Ltd agreed not to press SSS Ltd for repayment of the debt and further agreed to lend the plaintiff company the sum of £400,000 to repay its debt to SSS Ltd (which SSS was in turn to repay to C Ltd) in return for the plaintiff company agreeing to guarantee the debt owed by SSS Ltd to C Ltd and to sell the Rainham site by a specified date and use the proceeds to repay the debt, failing which the plaintiff company would issue a debenture over all its assets in favour of C Ltd. A board meeting of the plaintiff company was held on 22 January 1989 at which S and his co-director passed the necessary resolution approving the financial rearrangement and authorizing the guarantee and debenture. S did not declare at that meeting that he had personally guaranteed SSS Ltd's debt to C Ltd. Under art 17 of plaintiff company's articles of association a director who declared his interest in a contract with the company was entitled to vote as part of the quorum of two directors required for a board meeting. Following the passing of the resolution and various payments, the debt owed to C Ltd was effectively passed from SSS Ltd to the plaintiff company which executed a guarantee in favour of C Ltd and S's liability under his personal guarantee was proportionately reduced. When the Rainham site was not sold by the specified date the plaintiff company executed a debenture in favour of C Ltd and when a demand for the repayment of the debt was not met C Ltd appointed a receiver under the debenture. The receiver eventually sold the Rainham site for a sum sufficient to pay BSC the amount secured by the debenture and interest. However after payment of other preferential debts there was insufficient left to meet the unsecured liabilities of the plaintiff company. In these circumstances the plaintiff company brought an action against, amongst others, BSC and the receiver (the defendants) seeking a declaration that the guarantee and debentures were void and claiming repayment of the sum paid over to BSC by the receiver. The plaintiff company contended, inter alia, (i) that neither the guarantee nor the debenture was a deed duly authorized or executed by the plaintiff company, because of S's failure to disclose his interest (namely, that his own guarantee would be reduced) at the meeting of the plaintiff's directors on 22 January 1969 to authorize the financial rearrangement meant that he was disqualified from voting at that meeting which was consequently inquorate, (ii) that the guarantee and debenture were both ultra vires the plaintiff company and void and (iii) that the directors of the plaintiff company had acted in bad faith in entering into the financial rearrangement, which fact was known to BSC and therefore BSC held the money received from the

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plaintiff company as constructive trustee and the defendants were liable in equity to replace that money. The trial judge held (i) that the plaintiff company's claim that the guarantee and debenture had not been duly authorized failed in the face of the defence that the plaintiff company was to be assumed to have properly performed acts which it was within its constitution to carry out, but (ii) that the guarantee and debenture had been given by the plaintiff company for an unauthorized purpose, which fact BSC had been aware of and that the plaintiff company was therefore entitled to have those transactions set aside and the money repaid. The appeal of BSC and the receiver was dismissed by the Court of Appeal for the reasons as set out in the headnote of the reported case and I need only to summarize the more relevant reasons:

(1) The defence that a company could be assumed to have properly performed acts which were within its constitution was not an absolute and unqualified rule of law applicable in all circumstances but only applied in favour of persons dealing with the company in good faith. Since C Ltd was to be taken as knowing that the resolution of 22 January 1969 would not be valid unless pursuant to art 17 of the plaintiff company's articles of association S had in fact declared his interest in the guarantee and the debenture, C Ltd was, on the facts, not entitled to assume without making further inquiry that S had in fact declared his interest. There was therefore no defence to the plaintiff company's claim that neither the debenture and the guarantee were properly authorized deeds of the plaintiff company.

Pausing here to make an observation it is important to note that there is no allegation that in approving the loan to R & G one or more of the directors of the plaintiff company had failed to declare his or their interest in the loan agreement and the third party charge created as security for the loan given to R & G. Indeed counsel for the plaintiff in his submission quite correctly did not raise this issue. Reason (1) of the Court of Appeal in *Rolled Steel Products Ltd*[6] is therefore irrelevant. Reverting to reason (2) of the Court of Appeal, it reads as follows:

(2) In order to be ultra vires a company transaction had to be done in excess of, or outside, the capacity of the company and not merely in excess or abuse of the powers of the company exercised by the directors. Accordingly, whether a transaction was ultra vires depended solely on the construction of the memorandum of association and whether the transaction fell within the objects of the company, properly construed; and a transaction which was within the objects of the company or which was capable of being performed as reasonably ancillary or incidental to the objects was not ultra vires merely because the directors carried out the transaction for purposes which were not within the memorandum of association. Moreover, since the directors of a company were held out by the company as having ostensible authority to bind the company to transactions which, expressly or impliedly, fell within the powers conferred by the memorandum, a person dealing in good faith with the company was entitled to assume that the directors were properly exercising their powers for the purposes of the company and was further entitled to hold the company to the transaction. However, if the company entered into a transaction which, although intra vires as being within its objects, was in excess or an abuse of the directors' powers the transaction could set aside at the instance of the shareholders; and a person dealing with the company who had notice, whether actual or constructive, that the

transaction had been entered into in excess or abuse of the directors' powers could not hold the company to the transaction and would be accountable as a constructive trustee for any money or property received by him from the company. The power of the plaintiff company, under cl 3(k) of its memorandum, to lend and advance money 'on such terms as may seem expedient' was only a power and not a separate object and, furthermore, was a power which could only be used for the furtherance of the objects of the company. Since the guarantee and the debenture had been entered into in furtherance of purposes which were not authorized by the company's memorandum and were therefore beyond the authority of the directors and since that fact was known to C Ltd the plaintiff company was entitled to disclaim those transactions.

Pausing here again to make an observation, it may be seen from discussions as set out earlier that I have arrived at a conclusion that the defendant company could not be said to have any knowledge that the plaintiff company executed the third party charge not for the benefit or in furtherance of the objects of the said company. Furthermore on principle and authorities the knowledge acquired by Wong Teck Lim, one of the directors of the defendant company, could not be imputed to the defendant company. I need not repeat what have been thoroughly discussed earlier. It follows therefore that reason (2) of the Court of Appeal is only relevant if it could be said that the knowledge of Wong Teck Lim could be considered as that of the defendant company which I have found that it cannot be so considered.

Reason (3) of the Court of Appeal talks of the principle that if the directors applied the company's funds in breach of the fiduciary duty they owed to the company, a third party who received the funds *with knowledge* whether actual or constructive of the directors' breach then the third party must be deemed to hold the assets as constructive trustee of the company. Again this reason is irrelevant to the present case on the same ground as stated for my rejection of reason (2), namely, that the defendant company here has no knowledge whatsoever of the breach of fiduciary duty by the directors of the plaintiff company. In the circumstances of this case any breach of fiduciary duties on the part of the plaintiff company's directors is a matter inter se the directors and the company shareholders.

Notwithstanding the above three reasons given by the Court of Appeal in dismissing the BSC's appeal nonetheless it went on to say (see reason (4)):

> However, it was a principle of equity that where a third party's money was obtained by an agent's authorized act and applied for the benefit of the agent's principal the principal was liable to restore the money even though the third party knew the agent was not authorized to obtain or receive the money. Accordingly, it would be inequitable for the plaintiff company to be repaid the amount paid to SSS Ltd (to enable SSS Ltd to repay C Ltd) since although that payment was an unauthorized act by the directors the sum involved had been borrowed from C Ltd and the plaintiff company remained under an obligation to repay that sum to C Ltd.

It is interesting to note that the Court of Appeal deemed it fit to turn to equity in order to ensure that the plaintiff company should not be allowed to retain the money paid by C Ltd. To my mind the principle of equity as enunciated by the Court of Appeal is enshrined in s 20(1) of our Companies Act 1965 which would prevent the plaintiff from complaining that the

charge willingly created by them and which had the effect of inducing the defendant to give a loan to R & G is void and unenforceable.

The *Rolled Steel Products (Holdings) Ltd* case[6] is to my mind of no assistance to the case for the plaintiff.

In the ultimate analysis I am satisfied that the application of the plaintiff for a declaration that the charge created by it as mentioned in the first paragraph of this judgment and the ancillary reliefs thereto must be dismissed with costs.

Application dismissed.

Reported by PS Ranjan

Tan Guan Eng v BH Low Holdings Sdn Bhd & Ors and other actions

HIGH COURT (PENANG) — CIVIL SUIT NOS 22-228 OF 1989; 22-231 OF 1989 AND 22-245 OF 1989 AND ORIGINATING SUMMONS NO 24-363 OF 1989
WAN ADNAN J
5 JULY 1991

Companies and Corporations *— General meeting — Appointment of proxy — Qualifications of person appointed as proxy — Companies Act 1965 s 149(1)(b)*

Companies and Corporations *— General meeting — Whether chairman may adjourn meeting without consent of meeting — Quorum — Whether required after meeting proceeds to business*

Companies and Corporations *— General meeting — Invalid adjournment of meeting by chairman — Meeting continued with only the valid proxy of the majority shareholder remaining — Whether a single member can constitute a meeting — Whether resolution passed at such meeting was valid*

In these cases, which were consolidated by order of the court, an issue arose as to whether the appointment of one Mr Saw Heng Soo and one Mr Tan Keng Kooi as proxies of one Mr Tan Guan Sooi alias Tan Guan Eng, who was a member of the company, was valid in law. Article 88(1) of the articles of association of the company provided, inter alia, that: (a) a proxy may but need not be a member of the company; (b) a member shall not be entitled to appoint more than two proxies to attend and vote at the same meeting; and (c) where a member appoints two proxies, the appointments shall be invalid unless he specifies the proportions of his holdings to be represented by each proxy. It was contended for the defendants that s 149(1) of the Companies Act 1965 ('the Act'), which provided for the appointment of proxies for members to attend and vote at meetings of a company, did not apply in view of the provisions of art 88(1). It was contended that art 88(1) of the company's articles of association made provisions contrary to those of s 149(1)(b) of the Act. It was agreed by counsel

for the parties that Mr Saw was a company auditor and was in the full-time employment of Messrs Chocolate Products Bhd, and that Mr Tan Keng Kooi was not an advocate, an approved company auditor or a person specially approved by the Registrar of Companies for appointment as a proxy for the member concerned. A

A second issue arose as to whether the chairman of an extraordinary general meeting of the company had the power to adjourn or terminate the meeting without the consent of the meeting. B

After calling the meeting to order, the chairman adjourned the meeting without the consent of the proxy of Mr Tan Guan Sooi alias Tan Guan Eng. A resolution was then passed. Another issue arose therefore as to whether in the circumstances the meeting could in law be continued. C

Held, deciding the issues as follows:

(1) The subject matter of s 149(1)(b) of the Act was the qualification of a person (not being a member of the company) who can be appointed as a proxy. To exclude the operation of the section, the articles of association of a company must make contrary provisions in this respect. In the instant case, art 88(1) of the company's articles of association did not provide that a proxy who was not a member need not be one of the three categories of persons mentioned in s 149(1)(b) of the Act. The said section was therefore applicable. D E

(2) Both Mr Saw and Mr Tan Keng Kooi were not members of the company. As Mr Tan was neither an advocate, an approved company auditor nor a person specially approved by the Registrar of Companies, his appointment was not valid. But as Mr Saw was an approved company auditor, his appointment was valid. F

(3) Article 73 of the company's articles of association provided that the chairman of a meeting of the company can adjourn a meeting only with the consent of the meeting. The chairman did not have the power to adjourn or terminate the meeting in the manner in which he did. G

(4) The quorum was required only at the time when the meeting proceeded to business and, in the instant case, there was a quorum present when the meeting proceeded to business.

(5) In the circumstances of the case, the continued meeting with the presence of only the valid proxy of Mr Tan Guan Sooi alias Tan Guan Eng was a meeting. The resolution passed at the continued meeting was a valid resolution. H

[Bahasa Malaysia summary

Dalam kes-kes ini, yang telah disatukan melalui perintah mahkamah, satu isu timbul sama ada perlantikan seorang bernama En Saw Heng Soo dan seorang bernama En Tan Keng Kooi sebagai proksi-proksi seorang bernama En Tan Guan Sooi alias Tan Guan Eng, yang merupakan seorang ahli syarikat, adalah sah di sisi undang-undang. Perkara 88(1) perkara persatuan syarikat memperuntukkan, antara I

lainnya, bahawa: (a) seorang proksi boleh, tetapi tidak semestinya, merupakan seorang ahli syarikat; (b) seorang ahli tidak berhak melantik lebih daripada dua orang proksi untuk menghadiri dan mengundi dalam mesyuarat yang sama; dan (c) di mana seorang ahli melantik dua orang proksi, perlantikan-perlantikan itu akan ditaksahkan melainkan beliau menyatakan bahagian pegangannya untuk diwakili oleh setiap proksi. Adalah dihujahkan bagi defendan bahawa s 149(1) Akta Syarikat 1965 ('Akta itu'), yang memperuntukkan bagi perlantikan proksi untuk ahli-ahli menghadiri dan mengundi dalam mesyuarat sebuah syarikat, tidak terpakai oleh kerana peruntukan-peruntukan perkara 88(1). Adalah dihujahkan bahawa perkara 88(1) perkara-perkara persatuan syarikat membuat peruntukan-peruntukan yang bercanggan dengan s 149(1)(b) Akta itu. Adalah dipersetujui oleh peguam bagi pihak-pihak itu bahawa En Saw adalah seorang juruodit syarikat dan juga dalam penggajian sepenuh masa Tetuan Chocolate Products Bhd, dan bahawa En Tan Keng Kooi bukan seorang peguambela, seorang juruodit syarikat yang diluluskan atau seorang yang diluluskan secara khas oleh Pendaftar Syarikat untuk perlantikan sebagai seorang proksi untuk ahli yang berkenaan.

Isu kedua yang timbul ialah sama ada pengerusi suatu mensyuarat agung luarbiasa syarikat mempunyai kuasa untuk menangguh atau menamatkan mesyuarat tanpa persetujuan mesyuarat itu.

Selepas memanggil mesyuarat untuk bersidang, pengerusi menangguhkan mesyuarat tanpa persetujuan proksi En Tan Guan Sooi alias Tan Guan Eng. Satu resolusi kemudiannya diluluskan. Satu lagi isu yang timbul ialah sama ada dalam keadaan ini mesyuarat boleh diteruskan di sisi udang-undang.

Diputuskan, memutuskan isu-isu itu seperti berikut:

(1) Subjek perkara s 149(1)(b) Akta itu adalah kelayakan seseorang (yang bukan seorang ahli syarikat) yang boleh dilantik sebagai proksi. Untuk mengecualikan operasi seksyen tersebut, perkara-perkara persatuan sesebuah syarikat mestilah membuat peruntukan yang bertentangan. Dalam kes ini, perkara 88(1) perkara-perkara persatuan syarikat tidak memperuntukkan bahawa seorang proksi yang bukan seorang ahli tidak perlu merupakan salah satu daripada tiga kategori orang-orang yand disebut dalam s 149(1)(b) Akat itu. Oleh itu, seksyen tersebut adalah terpakai.

(2) Kedua-dua En Saw dan En Tan Keng Kooi bukanlah ahli-ahli syarikat itu. Oleh sebab En Tan bukanlah seorang peguambela, seorang juruodit syarikat yang diluluskan ataupun seorang yang diluluskan secara khas oleh Pendaftar Syarikat, perlantikannya adalah tidak sah. Tetapi oleh kerana En Saw adalah seorang juruodit syarikat yang diluluskan, perlantikannya adalah sah.

(3) Perkara 73 perkara-perkara persatuan syarikat itu memperuntukkan bahawa pengerusi sesebuah mesyuarat syarikat itu boleh menangguhkan mesyuarat hanya dengan persetujuan mesyuarat. Pengerusi tidak mempunyai kuasa untuk menangguh atau menamatkan mesyuarat dalam cara yang telah dilakukannya.

(4) Kuorom dikehendaki hanya pada waktu mesyuarat memulakan urusan dan, dalam kes ini, terdapat satu kuorum yang wujud semasa mesyuarat memulakan urusan.
(5) Dalam keadaan kes ini, mesyuarat yang diteruskan dengan kehadiran hanya seorang proksi sah En Tan Guan Sooi alias Tan Guan Eng adalah suatu mesyuarat. Resolusi yang diluluskan dalam mesyuarat yang diteruskan itu adalah resolusi yang sah.]

Notes
For cases on meetings, see 3 *Mallal's Digest* (4th Ed) paras 94-107.

Cases referred to
1 *LC Neil Enterprises Pty Ltd & Anor v Toxic Treatments Ltd* (1986) 4 ACLC 178 (refd)
2 *National Dwellings Society v Sykes* [1894] 3 Ch 159 (follD)
3 *John v Rees & Ors* [1969] 2 All ER 274 (follD)
4 *Re Hartley Baird Ltd* [1954] 3 All ER 695 (follD)
5 *Sharp v Dawes* (1876) 2 QBD 26 (refd)
6 *East v Bennett Brothers Ltd* [1911] 1 Ch 163 (follD)

Legislation referred to
Companies Act 1965 s 149(1)(b)
Companies Code (New South Wales) [Aust] s 242(1)

K Balasundaram (*Balasundaram & Co*) for the plaintiffs.
Loh Siew Cheang (*Cheang & Ariff*) for the defendants.

Cur Adv Vult

Wan Adnan J: By the order of the court made on 25 October 1989, the above actions were consolidated. Consequent thereto the parties agreed to let the court decide certain issues under O 33 of the Rules of the High Court 1980.

The following are the issues:

(1) Whether the appointment of Saw Heng Soo and Tan Keng Kooi or either or them as proxies of Tan Guan Eng @ Tan Guan Sooi for the purposes of the EGM of BH Low on 13 May 1989 was valid in law.
(2) Whether Mr Ng Kweng Hee, the chairman at the EGM of BH Low Sdn Bhd ('chairman'), had the power to adjourn or terminate the EGM in the manner in which he did.
(3) If the answer to question 2 is positive, whether the chairman had properly exercised the power.
(4) If the answer to either question 2 or question 3 is negative, whether the EGM could in law be continued in the circumstances.
(5) If the answer to question 4 is in the positive, whether the resolution passed at the EGM that was continued appointing Teh King Bing, Lim Eng Kim and Lim Chin Chong as directors of BH Low Sdn Bhd ('BH Low') is a valid resolution.

For the purpose of determining the issues the following facts were agreed to:

(1) BH Low is a company incorporated in Malaysia and has an authorized capital of $1m divided into 1,000,000 ordinary shares of $1 each, out of which 320,000 ordinary shares have been issued and paid up. The registered shareholders of BH Low and the number of shares held by them are as follows:

Shareholders	Shares
(a) Tan Guan Cheng	12,120
(b) Tan Guan Sooi @ Tan Guan Eng	170,000
(c) Ng Kweng Hee	2,000
(d) Ng Kweng Hee Sdn Bhd	100,000
(e) Ng Pee King	23,000
(f) Gooi Seng Hui	11,800
	320,000

(2) The three directors of BH Low as at 29 October 1988 were Tan Guan Sooi @ Tan Guan Eng, Tan Guan Cheng and Ng Kweng Hee. The secretary of BH Low is Gooi Seng Hui.

(3) The main object of BH Low is to invest in stocks, shares, debentures, to enter into partnerships, joint ventures etc and to carry on business as financiers. A copy of the memorandum and articles of association of BH Low is annexed hereto marked as 'D-1'.

(4) BH Low is the majority shareholder in a company known as Dragon Enterprise Sdn Bhd ('Dragon').

(5) Dragon is a holding company and has a paid-up capital of $594,000 shares of $1 each. The shareholders of Dragon and the number of shares held by them are as follows:

Shareholders	Shares
(a) BH Low	305,880
(b) Lam Chuan & Co (1947) Sdn Bhd	118,800
(c) Ong Peng Yeow	48,217
(d) Ong Seng Tee & Sons Sdn Bhd	29,700
(e) Ong Seng Sek	29,700
(f) Ong Swee Chan	11,880
(g) Yap Keek Kuan	24,750
(h) Yeap Kim Hoe	24,750
(i) Ng Kwee Hee Sdn Bhd	100
(j) Tan Guan Eng @ Tan Guan Sooi	83
(k) Gooi Seng Hui	80
(l) Ng Pee King	60
	594,000

(6) The directors of Dragon are Tan Guan Sooi @ Tan Guan Eng, Tan Guan Cheng, Ng Kweng Hee and Ng Kweng Chew. The secretary of Dragon is Gooi Seng Hui.

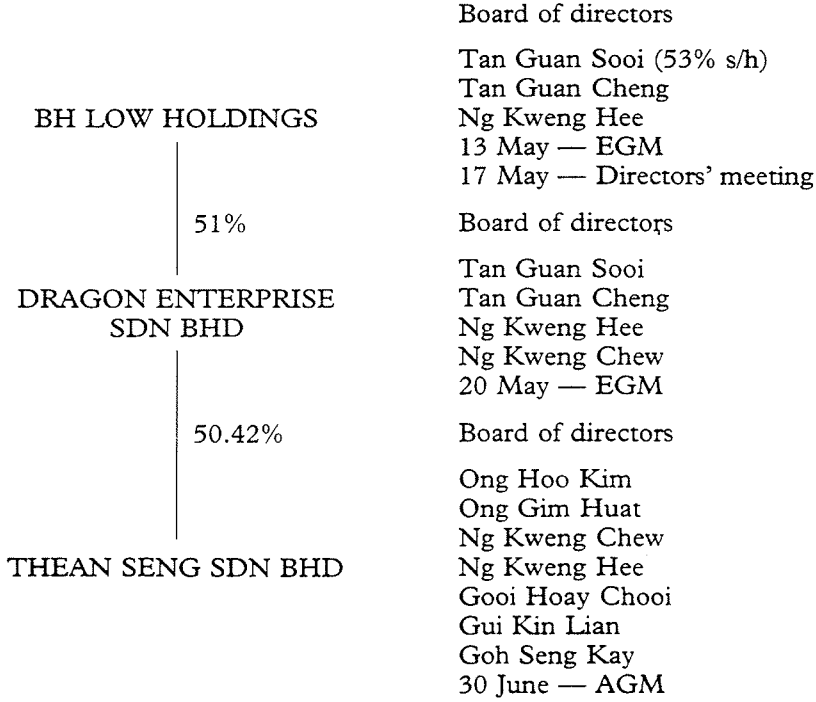
(7) Dragon holds majority shares in a company known as Thean Seng Co Sdn Bhd ('Thean Seng'). Other than its investment in Thean Seng, Dragon has no other investment.

(8) Thean Seng has an authorized capital of $2m out of which $1,289,000 has been paid up. The shareholders of Thean Seng and the number of shares held by them are as follows:

Shareholders	Shares
(a) Dragon Enterprise	6,513
(b) Kim Co Sdn Bhd	4,055
(c) Lim Hean Pin	693
(d) Chow Chee Chor	506
(e) Qui Kin Hai	434
(f) Gooi Hoay Choo	278
(g) Goh Seong Kay	150
(h) Chow Ho Hean	105
(i) Moey Heong Goon @ Moey Hoong Yoon	53
(j) Estate of Moey Hoong Kee	52
(k) Swee Yin Lee @ Moey Swee Yin	52
	12,891

(9) The directors of Thean Seng are Ong Hoo Kim, Ong Gim Huat, Ng Kweng Chew, Ng Kweng Hee, Gooi Hoay Chooi, Gui Kin Lian, and Goh Seng Kay. The secretaries of Thean Seng are Lim Chin Kooi and Lim Cheng Por.

(10) The diagram depicted below represents the essential structure of the companies in question:



(11) An EGM of BH Low was held on 13 May 1989. The EGM was requisited by Tan Guan Sooi @ Tan Guan Eng. A copy of the requisition is annexed hereto marked as 'D-2'.

(12) Notice of the EGM was sent out on 5 April 1989 and the resolutions to be passed were as follows:

(a) That Teh King Beng, Lim Eng Kim and Lim Chin Chong be appointed as directors of BH Low.

(b) That Ng Kweng Hee and Tan Guan Cheng be removed as directors of BH Low.

A copy of the notice is annexed hereto marked as 'D-3'.

(13) Those present at the EGM were:

Two proxies of Tan Guan Sooi @ Tan Guan Eng, namely, Saw Heng Soo and Tan Keng Kooi ('the proxies')
Ng Kweng Hee
Tan Guan Cheng
Gooi Seng Hui

(14) After the EGM of BH Low was called to order, the chairman of the meeting, Ng Kweng Hee, adjourned the meeting. Ng Kweng Hee, Tan Guan Cheng and Gooi Seng Hui then left the meeting.

(15) After the adjournment of the EGM, the proxies remained behind and proceeded with the EGM. At the continuation of the meeting, three directors were appointed to the board of BH Low, namely, Teh King Beng, Lim Eng Kim and Lim Ching Chong ('the new directors'). A copy of the minutes of the continued EGM is annexed hereto marked as 'D-4'.

(16) Ng Kweng Hee and Tan Guan Cheng on 15 May 1989 issued a notice calling for a board meeting of the directors to be held on 17 May 1989 to transact certain businesses, one of which was to appoint a proxy of BH Low to attend the EGM of Dragon to be held on 20 May 1989. A copy of the notice is annexed hereto marked as 'D-5'.

(17) On 17 May 1989, an injunction was issued against BH Low, Ng Kweng Hee and Tan Guan Cheng restraining them from interfering with the functions and duties of the new directors as directors of BH Low. A copy of the order of court dated 17 May 1989 is annexed hereto marked as 'D-6'.

(18) At the board of directors' meeting on 17 May 1989, a copy of 'D-4' was served on Ng Kweng Hee, Tan Guan Cheng and Gooi Seng Hooi. The chairman of the meeting, Ng Kweng Hee, upon being served with the order, adjourned the meeting.

(19) After the adjournment of the meeting, the new directors and Tan Guan Sooi @ Tan Guan Eng carried on with the meeting. Tan Guan Sooi @ Tan Guan Eng was elected as chairman of the meeting and was appointed as representative of BH Low to attend the EGM of Dragon which was to be held on 20 May 1989. A copy of the minutes of the continued meeting is annexed hereto marked as 'D-7'.

(20) On 20 May 1989, an injunction was issued against BH Low, Ng Kweng Hee, Tan Guan Cheng and Gooi Seng Hooi. A copy of the this order is annexed hereto marked as 'D-8'.

(21) On the same day, ie 20 May 1989, another injunction was also obtained, inter alia, to restrain Dragon from holding the EGM on 20 May 1989 and to restrain Tan Guan Sooi @ Tan Guan Eng from acting as corporate representative of BH Low in any general meeting of Dragon. A copy of the order is annexed hereto marked as 'D-9'.
(22) Following 'D-9', the EGM of Dragon was called off.
(23) On 29 May 1989, a new suit was filed in court requesting that the new directors be restrained from acting or holding themselves out as directors of BH Low and from otherwise meddling in BH Low's business or management of its affairs.

The first issue — whether the appointment of Saw Heng Soo and Tan Keng Kooi or either of them as proxies of Tan Guan Eng @ Tan Guan Sooi, for the purposes of the EGM of BH Low on 13 May 1989 was valid in law

Tan Guan Eng @ Tan Guan Sooi owns 170,000 shares in BH Low. He appointed Saw Heng Soo and Tan Keng Kooi as his proxies for the EGM of BH Low to be held on 13 May 1989.

Section 149(1) of the Companies Act 1965 ('the Act') states as follows:

> A member of a company entitled to attend and vote at a meeting of the company, or at a meeting of any class of members of the company, shall be entitled to appoint another person or persons (whether a member or not) as his proxy to attend and vote instead of the member at the meeting and a proxy appointed to attend and vote instead of a member shall also have the same right as the member to speak at the meeting, but *unless the articles otherwise provide* (emphasis added) —
>
> (a) a proxy shall not be entitled to vote except on a poll;
> (b) a member shall not be entitled to appoint a person who is not a member as his proxy unless that person is an advocate an approved company auditor or a person approved by the Registrar in a particular case;
> (c) a member shall not be entitled to appoint more than two proxies to attend and vote at the same meeting; and
> (d) where a member appoints two proxies the appointments shall be invalid unless he specifies the proportions of his holdings to be represented by each proxy.

Article 88(1) of the articles of association of BH Low states as follows:

> (a) A proxy may but need not be a member of the Company;
> (b) A member shall not be entitled to appoint more than two proxies to attend and vote at the same meeting; and
> (c) Where a member appoints two proxies the appointments shall be invalid unless he specifies the proportions of his holdings to be represented by each proxy.

For the purpose of s 149(1)(b) of the Act both counsel further agreed to the following facts:

(1) That Mr Saw Heng Soo is a company auditor.
(2) That as at date of the EGM, Mr Saw was in the full-time employment of Chocolate Products Bhd.
(3) That Mr Tan Keng Kooi is not an advocate.

Mr Loh contends that s 149(1)(b) of the Act does not apply in view of the provision of art 88(1) of the company's articles of association. He says that art 88(1) makes provisions contrary to the provisions in s 149(1)(b) and therefore the provisions of the section should cease to be applicable. He cited the NSW Court of Appeal case of *LC Neil Enterprises Pty Ltd & Anor v Toxic Treatments Ltd.*[1] In that case the provision of s 242(1) of the Companies Code was:

> So far as the articles do not make other provision, 2 or more members holding not less than 5% of the issued share capital, or, if the company does not have a share capital, not less than 5% in number of the members of the company may convene a meeting of the company.

Article 56 of the company's articles of association is as follows:

> The directors may wherever they think fit convene a general meeting and general meetings shall also be convened on such requisition or by such requisitionists as provided by s 241 of the Code. If at any time there are not within the state sufficient directors capable of (sic) acting to form a quorum, any director or any one member of the company may convene a general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

The appeal court by a majority decision held that art 56 did make 'other provision'. Hope JA said:

> Having regard to the language of the article and to the context in which it appears — which is part of the articles headed 'General Meetings' — art 56 does in my opinion make other provision for the calling of a meeting of the company on the 'narrower' construction of the section, that is, it makes other provision of the calling of a meeting upon the requisition of the members of the company.

In his dissenting judgment, Kirby P said:

> Accordingly, it is necessary to put the provisions of the article beside those of s 242 and to ask the question whether the latter constitutes an 'other provision' as the section contemplated.
>
> When viewed in this way it seems preferable to me that art 56 does not deal with what I take to be the proper subject matter of s 242, namely, the convening of meetings by requisitioning members. That being the subject matter of s 242 it is a subject matter upon which the articles must make 'other provision' if they are to exclude the section's operation. When analysed in this light, art 56 can be seen to be addressed to meeting convened by directors.

I prefer to adopt the approach taken by Kirby P. What then is the subject matter of s 149(1)(b)? In my view the subject matter is the qualification of a person (not being a member of the company) who can be appointed as a proxy. To exclude the operation of the section, the article must make contrary provision in this respect. I find that art 88(1) does not provide that a proxy who is not a member need not be one of the three categories of persons mentioned in s 149(1)(b). In my view s 149(1)(b) is applicable.

Under s 149(1)(b), a person who is not a member of the company cannot be appointed a proxy unless he is an advocate, an approved company auditor or a person approved by the Registrar of Companies. Both Mr Saw Heng Soo and Tan Keng Kooi are not members of the company. As Mr Tan Keng Kooi is neither an advocate, an approved company auditor

nor a person specially approved by the Registrar of Companies, his appointment is not valid. But as Mr Saw Heng Soo is a company auditor his appointment is valid.

The second issue — whether Mr Ng Kweng Hee, the chairman at the EGM of BH Low ('chairman'), had the power to adjourn or terminate the EGM in the manner in which he did

Article 73 of the articles of association of the company provides as follows:

> The chairman may, with the consent of any meeting at which a quorum is present and shall, if so directed by the meeting, adjourn any meeting from time to time and from place to place as the meeting shall determine. Whenever a meeting is adjourned for 21 days or more, notice of the adjourned meeting shall be given in the same manner as in the case of an original meeting. Save as aforesaid, no member shall be entitled to any notice of an adjournment or of the business to be transacted at an adjourned meeting. No business shall be transacted at any adjourned meeting other than the business which might have been transacted at the meeting from which the adjournment took place.

According to para 14 of the agreed facts, the chairman of the meeting, Mr Ng Kweng Hee, adjourned the meeting after the EGM was called to order. He did not get the consent of the meeting to do so. Under art 73, the chairman can only adjourn a meeting with the consent of the meeting.

In *National Dwellings Society v Sykes*,[2] Chitty J in his judgment said at p 162:

> A question of some importance has been mooted in this case, with regard to the powers of the chairman over a meeting. Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner, and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting. But, in my opinion, the power which has been contended for is not within the scope of the authority of the chairman — namely, to stop the meeting at his own will and pleasure. The meeting is called for the particular purposes of the company. According to the constitution of the company, a certain officer has to preside. He presides with reference to the business which is to be transacted. In my opinion, he cannot say, after that business has been opened, 'I will have no more to do with it; I will not let this meeting proceed; I will stop it; I declare the meeting dissolved, and I leave the chair.' In my opinion, that is not within his power. The meeting by itself (and these articles certainly apply to what I have said) can resolve to go on with the business for which it has been convened, and to appoint a chairman to conduct the business which the other chairman, forgetful of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he himself does not like.

I agree with the said judgment. My answer to this issue is therefore in the negative.

The third issue — if the answer to question 2 is positive, whether the chairman had properly exercised the power

This question does not arise in view of the negative answer to issue no 2.

The fourth issue — if the answer to either question 2 or question 3 is negative, whether the EGM could in law be continued in the circumstances

Since the adjournment was not valid, the EGM could be continued. 'On the footing that there was no valid adjournment, it follows that ... the meeting remained in being and competent to transact business. The elections conducted after the departure of the plaintiff were accordingly valid ...' per Megarry J in *John v Rees & Ors*[3] at pp 294-295.

The fifth issue — if the answer to question 4 is in the positive, whether the resolution passed at the EGM that was continued appointing Teh King Beng, Lim Eng Kim and Lim Ching Chong as directors of BH Low is a valid resolution

Under art 70, two members must be present to form a general meeting. But art 69 provides, 'No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business.' The quorum is required only at the time when the meeting proceeds to business (see *Re Hartley Baird Ltd Ltd*[4]). There was a quorum present when the meeting proceeded to business. After the departure of Mr Ng Kweng Hee, Mr Tan Guan Cheng and Mr Gooi Seng Hooi, only Mr Saw the valid proxy remained.

In *Sharp v Dawes*,[5] Lord Coleridge CJ said at pp 28-29:

> This is an attempt to enforce against the defendant a call purporting to have been made under s 10 of the Stannaries Act 1869. Of course it cannot be enforced unless it was duly made within the Act. Now, the Act says that a call may be made at a meeting of a company with special notice, and we must ascertain what within the meaning of the Act is a meeting and whether one person alone can constitute such a meeting. It is said that the requirements of the Act are satisfied by a single shareholder going to the place appointed and professing to pass resolutions. The sixth and seventh sections of the Act show conclusively that there must be more than one person present; and the word 'meeting' prima facie means a coming together of more than one person. It is, of course, possible to show that the word 'meeting' has a meaning different from the ordinary meaning, but there is nothing here to show this to be the case.

Warrington J, in *East v Bennett Brothers Ltd*,[6] said at p 169: 'But now what I have to consider whether this is not one of the cases referred to by Lord Coleridge CJ as one in which it may be possible to show that the word 'meeting' has a meaning different from the ordinary meaning'. In that case Bennett was the holder of all the original preference shares. It was provided in the memorandum of association that no new shares should be issued unless such issue was sanctioned by an extraordinary resolution of the holders of the preference shares present at a separate meeting of such holders. Bennett presided the meeting and moved the resolution. Warrington J at p 170: 'I think on the whole that I may give effect to obvious common sense by holding that in this particular case, where there is only one shareholder of the class, on the true construction of the memorandum, the expression 'meeting' may be held to include that case'.

In the present case Mr Saw was the proxy of Tan Guan Sooi @ Tan Guan Eng who was the holder of 170,000 shares out of the issued share capital of 320,000. He was the majority shareholder. The EGM was requi-

sitioned by him. Notice of the EGM was sent out and the resolutions to be passed were: A

(a) That Teh King Beng, Lim Eng Kim and Lim Ching Chong be appointed as directors.
(b) That Ng Kweng Hee and Tan Guan Cheng be removed as directors.

Ng Kweng Hee, Tan Guan Cheng and another shareholder Gooi Seng Hooi attended the meeting. Ng Kweng Hee was in the chair. After calling the meeting to order Ng Kweng Hee adjourned the meeting and, together with Tan Guan Cheng and Gooi Seng Hooi, left the meeting leaving only the proxy of the majority shareholder, Tan Guan Sooi @ Tan Guan Eng. B

As with Warrington J, I have to consider whether this is not one of the cases referred to by Lord Coleridge CJ as one in which it may be possible to show that the word 'meeting' has a meaning different from the ordinary meaning. C

In my view in the circumstances of the case the continued EGM with the presence of only the valid proxy of Tan Guan Sooi @ Tan Guan Eng was a meeting. There was a quorum at the commencement of the meeting. Ng Kweng Hee must have sensed that the proceeding had taken a turn which he did not like and that the proposed resolutions were going to be passed when he, in violation of his duty as chairman, adjourned the meeting. The reason is too obvious. Mr Saw was the proxy of the majority shareholder. D

My answer to this issue is therefore in the affirmative. The resolution appointing Teh King Beng, Lim Eng Kim and Lim Ching Chong as directors is a valid resolution. E

Consequently the following orders were made: Civil Suit No 22-228-1989:

(1) A declaration that the termination of the EGM of the first defendant on 13 May 1989 by the second defendant was unlawful. F
(2) A declaration that the continuation of the EGM by the plaintiff's proxy was lawful and that the appointment of Teh King Beng, Lim Eng Kim and Lim Ching Chong as directors is valid.
(3) The injunction as prayer in prayer (iii).
(4) Costs to be paid by the defendant. G

Civil Suit No 22-245-1989: The action is dismissed with costs. Civil Suit No 22-231-1989: The injunction granted on 14 June 1989 is set aside with costs. Originating Summons No 24-363-1989: The ex parte order dated 18 May 1989 is set aside with costs. The originating summons is dismissed with costs. H

Order accordingly.

Reported by PS Ranjan

I